Supreme Court, U.S.
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No.

In the Supreme Court of the United States

LARRY A. WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MIRIAM R. NEMETZ
Counsel of Record
MAYA D. SONG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a criminal defendant's claim that his jury trial waiver did not satisfy constitutional requirements, if raised for the first time on appeal, is subject to "plain error" review.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Larry A. Williams, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a–19a) is reported at 559 F.3d 607. The order of the court of appeals denying the petition for rehearing (*id.* at 20a–21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2009. A petition for rehearing was denied on June 11, 2009. App., *infra*, 20a–21a. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Question Presented implicates Article III, § 2 and the Sixth Amendment to the United States Constitution, and Federal Rules of Criminal Procedure 11, 23(a), and 52. The pertinent parts of those provisions are set forth in the Appendix.

INTRODUCTION

This case presents an important and recurring question about which the Seventh Circuit and other circuits disagree: What standard of review applies to a criminal defendant's claim, raised for the first time on appeal, that the waiver of his right to a jury trial did not satisfy constitutional requirements? Other circuits review the validity of a jury trial waiver *de novo*—even when the defendant has failed to argue

before the trial court that the waiver was infirm. In the decision below, however, the court of appeals reviewed petitioner's claim of invalid jury waiver for "plain error." Applying that demanding standard, it affirmed petitioner's conviction despite acknowledging that the trial record did not permit it to conclude that petitioner's waiver of his jury trial right was knowing and intelligent.

Petitioner orally agreed to have a bench trial rather than a jury trial. Nothing in the trial record, however, indicated that he understood the fundamental right that he was waiving. Stating that it "ha[d] no way to assess [petitioner's] mental state," the court of appeals conceded the possibility that petitioner "had no idea what he was doing" and "would have insisted on a jury trial had he been properly admonished." App., *infra*, 14a. Nevertheless, the court of appeals did not hold that the trial court erred in accepting the waiver. Instead, it held that the record's very silence as to petitioner's state of mind required the court of appeals to reject his contention that the waiver failed to satisfy constitutional requirements.

In so holding, the Seventh Circuit purported to follow *United States* v. *Vonn*, 535 U.S. 55 (2002), and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004). In those cases, this Court held that claims of error based on the trial court's failure to adhere to the procedures for accepting a guilty plea specified in Federal Rule of Criminal Procedure 11, when raised for the first time on appeal, are subject to plain error review under Federal Rule of Criminal Procedure 52(b). Citing *Vonn* and *Dominguez Benitez*, the court of appeals concluded that plain error review also must apply to claims that a jury trial waiver was not

knowing and intelligent, when such claims are raised for the first time on appeal. It therefore held that petitioner could prevail only if he could point to evidence in the trial record affirmatively demonstrating that (1) he did not have a concrete understanding of his right to a jury trial, and (2) but for the trial court's failure to ensure that he had that understanding, there was a reasonable probability that he would not have waived the right. Because the trial record disclosed nothing about his mental state, petitioner's claim was rejected.

In conflict with the decision below, other circuits review the validity of a jury waiver *de novo*, even when the defendant has failed to argue before the trial court that the waiver was insufficient. Applying this *de novo* standard, these courts examine the record to determine whether it indicates that the waiver was knowing and intelligent. If the record contains affirmative evidence establishing the defendant's informed consent, they affirm; but if such evidence is absent, they hold the waiver invalid and reverse. No other court of appeals has held that silence or ambiguity in the trial record regarding the defendant's understanding of his rights requires rejection of the claim that the waiver was invalid.

Because the Seventh Circuit's ruling conflicts with decisions of other courts of appeals, misinterprets this Court's decisions in *Vonn* and *Dominguez Benitez*, and affords insufficient protection to an important constitutional right, review by this Court is warranted.

STATEMENT

A. District Court Proceedings

On November 4, 2001, petitioner was arrested on charges relating to drugs seized by government agents the previous year, and on November 30, 2004, he was indicted in the Northern District of Illinois on one count of knowingly and intentionally distributing crack cocaine in violation of 21 U.S.C. § 841(a)(1). App., *infra*, 2a. Petitioner pleaded not guilty at his arraignment on December 7, 2004, and was appointed counsel. After a series of status conferences and continuances, petitioner's counsel moved to withdraw in May 2006. The district court granted the motion, and, on May 19, 2006, appointed an attorney from the Federal Defender Program, Mr. Rodriguez, to represent petitioner. *Id.*

At a status hearing on November 30, 2006, at which petitioner was not present, petitioner's attorney requested a bench trial. The relevant excerpt from the transcript of that status conference reads:

> Mr. Rodriguez: Good morning, your Honor. Sergio Rodriguez from the Federal Defender Program on behalf of Larry Williams. He was not brought over, but I was in contact with him. Your Honor, we are here to get a trial date finally. We are going to ask that this Court consider a bench trial. It should only be a couple of days long.
>
> * * *
>
> The Court: How long will it take?

Mr. Rodriguez:	It is only going to be a couple of days.
Mr. Gurland: [Assistant U.S. Attorney]	It should be quick.
The Court:	And you have consented?
Mr. Gurland:	I have no objection to a bench trial.
Mr. Rodriguez:	He is smiling, Judge.
The Court:	Well, you actually have to consent.
Mr. Gurland:	I consent.
The Court:	I know that is painful.

App., *infra*, 2a–3a.

At no point during the status conference did Mr. Rodriguez tell the district court that petitioner understood his constitutional right to a jury trial. Nevertheless, the district court set the matter down for a bench trial on March 5, 2007. Shortly after this status conference, Mr. Rodriguez moved to withdraw as counsel, mentioning without elaboration that petitioner "still wishe[d] to have a bench trial." Petitioner was appointed a new attorney. App., *infra*, 3a.

On the morning of petitioner's bench trial on March 5, 2007, the district court judge addressed petitioner for the first time regarding his jury waiver: "I just want to make sure that you know you do have a right to have a jury trial," he stated. "And would you like to have a bench trial and waive the jury trial?" Petitioner replied, "Yes, sir." App., *infra*, 4a. The district court judge, making no inquiry into petitioner's understanding of his jury right, commenced

the trial. Petitioner did not execute a written waiver of his jury right.

The district court judge found petitioner guilty on March 6, 2007, and on July 12, 2007, sentenced him to a prison term of 252 months. App., *infra*, 4a. Petitioner filed a timely notice of appeal to the Seventh Circuit, and was appointed a different attorney on appeal.

B. Petitioner's Appeal

With the assistance of new counsel, petitioner contended on appeal that he had not knowingly and intelligently waived his right to a jury trial, as is required for a valid waiver of a fundamental constitutional right. He argued that the district court erred in accepting his jury waiver when there was no basis to conclude that he understood the right he was waiving. He also pointed out that neither the Government nor the district court judge had attempted to procure a written waiver, even though such a waiver is required by Federal Rule of Criminal Procedure 23(a). App., *infra*, 3a–5a.

Petitioner further argued that his waiver was ineffective because the district court judge failed to comply with a supervisory rule adopted by the Seventh Circuit in *United States* v. *Scott*, 583 F.2d 362 (7th Cir. 1978) (per curiam). This rule requires district court judges, before accepting a criminal defendant's jury waiver, to confirm by means of interrogation that the defendant understands the nature of the right and the consequences of his waiver. App., *infra*, 7a. In *United States* v. *Delgado*, 635 F.2d 889 (7th Cir. 1981), the Seventh Circuit established this model colloquy: the district court judge is to explain to the defendant that (1) "a jury is composed of

twelve members of the community"; (2) the "defendant may participate in the selection of jurors"; (3) "the verdict of the jury is unanimous"; and (4) in a bench trial, "the judge alone will decide guilt or innocence." *Id.* at 4a. As the court of appeals acknowledged, "[t]he court's brief exchange with [petitioner] at the start of the trial did not cover these points; the court simply confirmed that [petitioner] knew he had a right to a jury trial and wished to waive it." *Id.* at 4a–5a.

C. The Decision Below

The Seventh Circuit affirmed, holding that petitioner failed to show that the district court committed plain error in accepting his jury waiver.

The court of appeals noted that the district judge had neither undertaken the colloquy required by *Scott* and *Delgado* nor procured a written waiver. App., *infra*, 8a. It pointed out, however, that "the sole constitutional requirement is that the waiver be voluntary, knowing and intelligent." *Id.* Thus, it stated, a jury waiver may be valid despite "the failure to comply with one or both of these requirements," as long as the defendant has a "concrete understanding of his right to a jury trial." *Id.* at 7a–8a (internal quotation marks omitted).

The court of appeals was unable to say that petitioner possessed such a "concrete understanding" of his jury trial right. In fact, the court concluded, the record "thr[ew] little if any light on [petitioner's] understanding of the right he waived," and the court "ha[d] no way to assess his mental state." App., *infra*, 8a, 14a. Indeed, while it was possible that petitioner "had an adequate understanding of the right, whether by virtue of his attorney's advice or his own

education and experience," it was "also possible that [petitioner] *had no idea what he was doing and that he would have insisted on a jury trial had he been properly admonished.*" *Id.* at 14a (emphasis added).

Nevertheless, the court of appeals did not hold that the district court had erred in accepting the waiver. Instead, it held that the record's silence must be construed against the defendant, concluding that this Court's decisions in *United States* v. *Vonn*, 535 U.S. 55 (2002), and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004), required that result. App., *infra*, 13a–14a.

Vonn and *Dominguez Benitez* both dealt with putative errors under Federal Rule of Criminal Procedure 11, which outlines procedures for accepting a guilty plea. In *Vonn*, this Court concluded that when a defendant challenges the validity of his guilty plea by claiming a violation of Rule 11 for the first time on appeal, he bears the burden of showing that the defect constitutes plain error affecting his substantial rights. App., *infra*, 10a. In *Dominguez Benitez*, the Court further held that a defendant who raises a defect in the Rule 11 plea colloquy for the first time on appeal must establish that it was reasonably likely that he would not have pleaded guilty had he been properly apprised of his rights. *Id.* at 11a.

In the view of the court of appeals, *Vonn* and *Dominguez Benitez* "le[ft] no doubt as to the standard of review that governs [petitioner's] claim." App., *infra*, 13a. Invoking these two cases, it concluded that when a defendant raises a constitutional challenge to his jury waiver for the first time on appeal, he bears the burden of proof, and must show that any error by the trial court in receiving the waiver affected his substantial rights. *Id.* Specifically, the defendant

must point to affirmative evidence that (1) he did not have a concrete understanding of his right, and (2) but for the trial court's failure to ensure that he had that understanding, there is a reasonable probability that he would not have waived the right. *Id.*

Concluding that petitioner could not make this showing on the silent record, the Seventh Circuit affirmed his conviction. App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari in this case to clarify what standard of review applies to a defendant's claim, raised for the first time on appeal, that the waiver of his right to a jury trial did not satisfy constitutional requirements. There is a clear conflict in the circuits regarding this important and oft-recurring question, the answer to which is outcome determinative in many cases. Review is warranted to ensure that the lower courts follow a consistent approach that affords an appropriate degree of protection to an important constitutional right.

The Seventh Circuit is alone in reviewing for plain error under the circumstances presented here. No other court of appeals has declined to evaluate the validity of a defendant's jury waiver on the ground that the defendant failed to raise the issue in the district court. Instead, other circuits review the validity of a jury waiver *de novo*; pursuant to that standard, they examine the record independently to determine whether it demonstrates that the defendant gave informed consent. If, as in this case, the record reveals nothing about the defendant's state of mind, these courts deem the waiver insufficient and reverse. Indeed, petitioner's conviction likely would have been reversed had his appeal been filed in a cir-

cuit applying *de novo* review. The Seventh Circuit's departure from the approach of other circuits warrants review by this Court.

This Court's intervention is especially appropriate because the decision below rests on an erroneous extension of *Vonn* and *Dominguez Benitez*. In those cases, this Court clarified the substantial showing required of a defendant who asserts error under a *procedural rule*—Federal Rule of Criminal Procedure 11—for the first time on appeal. The Court did not remotely suggest that the same burden should be placed on a defendant when the claimed error is the failure to satisfy the *constitutional requirement* that the waiver of a fundamental right be knowing and intelligent. Yet, the Seventh Circuit has interpreted this Court's decisions to mandate that outcome.

Finally, review by the Court is warranted because the Seventh Circuit's approach inadequately protects the right to trial by jury guaranteed in the Constitution. Under the standard of review adopted by the Seventh Circuit, reviewing courts in most cases will not even assess the sufficiency of a jury waiver challenged for the first time on appeal. Instead, unless the defendant can make the improbable showing outlined by the Seventh Circuit in this case, the appellate court will simply affirm on the basis that the defendant has failed to show plain error. That approach virtually ensures that, in many cases, jury waivers that fail to satisfy constitutional requirements will never be reviewed on the merits. This Court should not allow that result without further review.

I. The Decision Below Conflicts With Decisions Of Other Circuits

The Seventh Circuit's ruling regarding the standard of review applicable to claims of invalid jury waiver conflicts with decisions of at least six other circuits. No other circuit applies plain error review to claims of invalid waiver raised for the first time on appeal.

The Second, Fourth, Ninth, Tenth, and Eleventh Circuits conduct *de novo* review of claims that a jury trial waiver was invalid. See *U.S.* v. *Carmenate*, 544 F.3d 105, 107 (2d Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 586 (2008); *U.S.* v. *Khan*, 461 F.3d 477, 491 (4th Cir. 2006); *U.S.* v. *Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997); *U.S.* v. *Robertson*, 45 F.3d 1423, 1430 (10th Cir. 1995); *U.S.* v. *Diaz*, 540 F.3d 1316, 1321 (11th Cir. 2008) (per curiam). These courts do not, as the Seventh Circuit did in this case, place on the defendant the burden of demonstrating interference with substantial rights. Instead, they simply examine the record and make an independent determination of whether the jury trial waiver was adequate.

Thus, if the record shows that the defendant gave informed consent to a bench trial, these courts conclude that the district court's acceptance of the waiver was proper, and affirm. See, *e.g.*, *Carmenate*, 544 F.3d at 106 (affirming district court's decision to grant a bench trial because the record showed that defendant's waiver was valid); *Khan*, 461 F.3d at 492 (same). If, however, the record does not show that the defendant's purported waiver was knowing and intelligent, then the court of appeals will vacate the conviction. See, *e.g.*, *Duarte-Higareda*, 113 F.3d at 1003 (reversing conviction because record did not

show that defendant's purported waiver was made voluntarily, knowingly, and intelligently); *Robertson*, 45 F.3d at 1433 (vacating conviction and remanding with instructions to provide defendant a jury trial because "there [was] no evidence in the record to indicate the waiver of her right to trial by jury was knowing, intelligent, and voluntary at the time it was accepted by the district court"); and *Diaz*, 540 F.3d at 1323 (vacating conviction and remanding because record showed that defendant "did not effectively waive his right to a jury trial").

Decisions of the Ninth, Tenth, and Eleventh Circuits conflict most starkly with the decision below. These courts have applied *de novo* review to claims of invalid jury waiver raised for the first time on appeal, and have vacated the defendants' convictions after concluding that the trial records did not indicate valid waiver.

In *Duarte-Higareda*, the Ninth Circuit, applying *de novo* review, reversed the defendant's conviction after concluding that the record did not show that the defendant's purported waiver was knowing, intelligent, and voluntary. 113 F.3d at 1002–03. At a pretrial hearing, Duarte's trial attorney told the district court that his non-English-speaking client would waive his right to be tried by a jury. *Id.* at 1002. Duarte then signed a written waiver, printed entirely in English; the record did not reflect whether the written waiver was translated into Spanish for the defendant. *Id.* Further, the district court at no point addressed Duarte through a Spanish interpreter to confirm that Duarte understood the right he was waiving. *Id.*

The Ninth Circuit concluded that the district court erred in failing to conduct a colloquy with

Duarte to ensure that he understood the right he was waiving. *Duarte-Higareda*, 113 F.3d at 1003. In doing so, it reaffirmed that "*the showing [in the record]* that a waiver is voluntary, knowing, and intelligent remains a necessary precondition" for valid waiver. *Id.* (internal quotation marks omitted; emphasis added). Since Duarte's record was silent as to the validity of his waiver, the court reversed Duarte's conviction.[1] *Id.*

Similarly, in *Robertson*, the Tenth Circuit vacated the defendant's conviction because "there [was] *nothing in the record* before [it] indicating [the defendant] personally understood her right and knowingly waived it." 45 F.3d at 1433 (emphasis added). The defendant, convicted after a bench trial, challenged her jury trial waiver for the first time on appeal. The Tenth Circuit reviewed the record *de novo* (*id.* at 1430), and found that the record did not contain a written waiver signed by the defendant (it was signed only by her attorney), nor had the district court "inquired as to the circumstances surrounding

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[1] In an earlier decision, *United States* v. *Saadya*, 750 F.2d 1419 (9th Cir. 1985), the Ninth Circuit, while not explicitly applying *de novo* review, similarly reversed and remanded the defendants' conviction because the record contained no evidence that defendants' jury waiver had been knowing and intelligent: "Because neither a written waiver of appellants' right to a trial by jury, nor appellants' oral consent to a trial without a jury appears on the record, we are required to reverse and remand." *Id.* at 1420. In that case, too, the defendants raised their claim of invalid jury waiver for the first time on appeal. The Ninth Circuit emphasized that a "defendant's waiver of his right to jury trial *must appear on the record* prior to the time the trial commences. The absence of a waiver on the record of the right to trial by jury cannot be remedied by subsequent proceedings on remand." *Id.* at 1422 (emphasis added).

the waiver and no discussion was ever held in the presence of Ms. Walker regarding her decision to waive the right to trial by jury." *Id.* at 1432–33. There was no other indication in the record that the defendant gave informed consent to the jury waiver. "Under these circumstances," the Tenth Circuit stated, "there is no way for a reviewing court to determine whether Ms. Walker's waiver was knowing, voluntary, and intelligent." *Id.* at 1433.

Moreover, the Tenth Circuit stated, the silence of the record as to whether the defendant gave informed consent, "coupled with the strong presumption against finding a waiver of fundamental constitutional rights, compels us to reject the government's argument that her waiver is nevertheless valid." *Robertson*, 45 F.3d at 1433. To otherwise find the waiver valid, the court stated,

> would require us to permit the waiver of a fundamental constitutional right based on nothing more than conjecture and speculation. This we decline to do. The right of trial by jury is one enjoyed by the people as well as defendants and courts should be hesitant to dispense with that right.

Id. Accordingly, the Tenth Circuit held that the defendant's "conviction must be vacated as there is no evidence in the record to indicate the waiver of her right to trial by jury was knowing, intelligent, and voluntary at the time it was accepted by the district court." *Id.*

Finally, in *Diaz*, the Eleventh Circuit vacated the defendant's conviction "[a]fter *reviewing the record* and the parties' briefs, and with the benefit of oral argument," concluding that "Diaz did not knowingly

waive his right to a jury trial." 540 F.3d at 1317 (emphasis added). Diaz was convicted after a bench trial and asserted for the first time on appeal that his waiver of his jury right had not been knowing and voluntary. Conducting *de novo* review (*id.* at 1321), the Eleventh Circuit found that the record contained no written jury waiver, and the defendant's "motion and statements regarding his intent to waive his right to jury trial were equivocal," not knowing and intelligent. *Id.* at 1323. Accordingly, the court "conclude[d] that Diaz did not validly waive his right to a jury trial." *Id.* at 1322.

The Second and Fourth Circuits also have explicitly applied *de novo* review to claims of invalid jury waiver raised for the first time on appeal. They have affirmed convictions after concluding upon plenary review of the record that the defendant's jury waiver was valid. These decisions also conflict with the decision below: Unlike the Seventh Circuit here, the reviewing courts reached the merits of the constitutional issues presented to them, and affirmed only after concluding that the trial record reflected a valid waiver.

The defendant in *Carmenate* argued on appeal to the Second Circuit that his jury waiver was not valid because he never signed a written jury waiver as required by Rule 23(a), and the district court did not properly inform him of the scope of the right and the consequences of a waiver before granting a bench trial. 544 F.3d at 106. Reviewing the district court's grant of a bench trial *de novo* (*id.* at 107), the Second Circuit stated that it "[could]not say that defendant's waiver of his constitutional right to a jury trial was fatally flawed." *Id.* at 108. The record showed that the defendant had been present when his attor-

ney first requested a bench trial and explained that the decision was based on trial strategy; the defendant also was present when, at the final pre-trial conference, the district court requested a written waiver (though a valid one was never furnished); and, before the start of the bench trial, the district court "questioned defendant on the record to be sure that his wishes [for a bench trial] were accurately understood."[2] *Id.*

The Second Circuit concluded that "[d]espite certain technical flaws in the waiver process, *the record indicates* that defendant's waiver of his right to a jury trial was knowing, voluntary, and intelligent," and accordingly affirmed. *Carmenate*, 544 F.3d at 106 (emphasis added).

Similarly, in *Khan*, the defendants were convicted after a bench trial, and for the first time on appeal argued that their "jury trial waiver was invalid because the district court did not obtain their written waiver or otherwise conduct a colloquy on the record to determine that their waiver was knowing, voluntary, and intelligent." 461 F.3d at 491. Applying *de novo* review (*id.*), the Fourth Circuit, after conducting an independent review of the record, stated, "[W]e find that *the record supports a conclusion* that the waivers were voluntary, knowing, and intelligent, even though signed by counsel and in the absence of a colloquy." *Id.* at 492 (emphasis added);

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[2] In support of its conclusion that the waiver was valid, the Second Circuit also stated that "there [was] no indication in the record that defendant was incapable of clearly and independently expressing his wishes, such that we might conclude that defense counsel did not accurately convey defendant's decision to forego a jury trial." *Carmenate*, 544 F.3d at 109.

see also *id.* ("the record reflects that the defendants' Rule 23 waivers were a knowing, voluntary, and intelligent part of their trial strategy").[3] Accordingly, the Fourth Circuit upheld the defendants' jury waiver as valid. *Id.*[4]

Although not expressly applying *de novo* review, the Fifth Circuit also places on the government the burden to show on appeal that the defendant's jury waiver was valid. In *United States* v. *Igbinosun*, 528 F.3d 387 (5th Cir. 2008), the defendant argued for the first time on appeal that her jury waiver was not knowing and intelligent. *Id.* at 390. The Fifth Circuit in that case stated that the government bore the initial burden of proof. It ultimately concluded that "the *government has carried its burden to demonstrate adequate waiver* under Rule 23(a)," because

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[3] The court of appeals concluded that the defendants' waiver was valid because the record showed that they had moved for a bench trial "as a back door attack on the district court's denial of their motions to sever," and the waiver, "a calculated part of the defendants' trial strategy," was thus knowing and intelligent. *Khan*, 461 F.3d at 492.

[4] The First Circuit also has applied *de novo* review to a claim of invalid jury waiver—albeit in a case in which the issue was raised before the district court. In *United States v. Leja*, 448 F.3d 86 (1st Cir. 2006), the defendant filed a post-trial motion for a new trial, claiming, among other things, that his jury waiver was invalid because he had not personally signed it and the court had not conducted an in-depth colloquy with him on the subject. *Id.* at 91. The district court denied the motion, finding that Leja's jury waiver was knowing, intelligent, and voluntary. On appeal, the government argued that the court should review the denial of Leja's motion for new trial for harmless error. *Id.* at 92. The First Circuit refused to give anything but "plenary review," however, "[g]iven the significance of the constitutional right at issue here and its relationship to the inquiry of how the district court handled the issue of waiver." *Id.*

"the record demonstrates that Igbinosun signed a written waiver, in addition to filing a motion for a bench trial and twice stating on the record that she had consulted with counsel before waiving her right to a jury trial." *Id.* at 390 (emphasis added). Because the Fifth Circuit concluded that the defendant could "point to no prejudice to overcome the presumption that her written waiver was knowing and intelligent," the court found her jury waiver valid. *Id.*

The approach of these circuits to review of claims of invalid jury waiver contrasts sharply with that of the Seventh Circuit. If petitioner had presented his claim to a court employing *de novo* review, the lack of record evidence demonstrating that his waiver was knowing and intelligent would have been treated as rendering the waiver defective, requiring reversal of petitioner's conviction. See, *e.g.*, *Robertson*, 45 F.3d at 1433 (vacating conviction because of silent record); *Diaz*, 540 F.3d at 1322 (same). At the very least, the reviewing court would have directly confronted the question of whether petitioner's waiver was constitutionally sufficient. Here, in contrast, the Seventh Circuit affirmed petitioner's conviction without concluding that the waiver of his jury trial right was in fact knowing and intelligent.

Thus, a defendant who seeks to challenge his jury waiver for the first time on appeal faces a much higher burden in the Seventh Circuit than in other circuits. Indeed, the court of appeals acknowledged that, had petitioner raised his claim in the district court, "the result of this appeal might well have been different on such a limited record." App., *infra*, 16a–17a. The divergence between the Seventh Circuit

and the other federal appellate courts warrants review.

II. The Seventh Circuit's Application Of "Plain Error" Review To Petitioner's Claim Was Based On A Mistaken Construction Of *Vonn* and *Dominguez Benitez*

In importing the plain error test from *Vonn* and *Dominguez Benitez*, the Seventh Circuit failed to distinguish between the standard of review that applies to non-constitutional errors of the sort at issue in those cases, and the constitutional error claimed by petitioner in this case. Indeed, in *Dominguez Benitez*, this Court explicitly distinguished *constitutional* claims of invalid waiver of fundamental rights from the Rule 11 error raised by the defendant in that case. Nevertheless, the Seventh Circuit erroneously concluded that "[t]hese two decisions leave no doubt as to the standard of review that governs [petitioner's] claim." App., *infra*, 13a.

Rule 11 "requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands * * * his rights as a criminal defendant." *Vonn*, 535 U.S. at 62. Under Rule 11(b), the district court "must address the defendant personally in open court," and "[d]uring this address * * * inform the defendant of, and determine that the defendant understands" such rights as "the right to plead not guilty"; "the right to a jury trial"; and "the right to be represented by counsel." Fed. R. Crim. P. 11(b)(1). In addition, "[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary." *Id.* at 11(b)(2).

As the Seventh Circuit noted, the purpose of the detailed colloquy required by Rule 11 is, "like the *Delgado* colloquy * * * designed to ensure that the [defendant's] decision to waive his constitutional rights is freely and intelligently made." App., *infra*, 10a. And, again like the *Delgado* supervisory rule, Rule 11 is not a constitutional mandate; it is not required as an element of due process. See *Dominguez Benitez*, 542 U.S. at 83 (emphasizing that "the violation claimed [by defendant] was of Rule 11, not of due process"). Indeed, Rule 11 itself contains a standard of review that instructs "that not every violation of its terms calls for reversal of conviction." *Dominguez Benitez*, 542 U.S. at 80 (citing Fed. R. Crim. P. 11(h)).

Neither of the defendants in *Vonn* and *Dominguez Benitez* claimed constitutional error in the waiver of their fundamental rights in their pleas—they did not contend that their waiver of these rights was not voluntary, knowing, and intelligent. Instead, they merely asserted error under Rule 11. See *Vonn*, 535 U.S. at 1047 (on appeal, defendant challenged the district court's "Rule 11 omission"); *Dominguez Benitez*, 542 U.S. at 79 (on appeal, defendant argued that the district court failed "to warn him, as Rule 11(c)(3)(B) instructs, that he could not withdraw his guilty plea if the court did not accept the Government's recommendations").

This Court, in setting forth the standard of review that applies to claims of Rule 11 error raised for the first time on appeal in those two cases, explicitly distinguished claims of constitutional error. In *Dominguez Benitez*, this Court stated that review of a Rule 11 error "contrast[s] with the *constitutional question* whether a defendant's guilty plea was

knowing and voluntary." 542 U.S. at 84 n.10 (emphasis added). The Court continued:

> We have held * * * that when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed. *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). *We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.*

Id. (emphasis added). This Court thus explicitly excluded constitutional challenges from the stringent standard of plain error review set forth in *Vonn* and *Dominguez Benitez*.

In applying plain error review to claims that a jury waiver was *constitutionally* invalid, the Seventh Circuit has extended *Vonn* and *Dominguez Benitez* beyond the intended limits of those decisions. Because the Seventh Circuit has misread and misapplied this Court's decisions and, in doing so, has sharply curtailed the appellate court's role in protections an important constitutional right, review by this Court is warranted.

III. The Seventh Circuit's Decision Insufficiently Protects The Right To A Jury Trial

The Seventh Circuit's adoption of the "plain error" standard substantially weakens the role of the appellate courts in ensuring that jury trial waivers satisfy constitutional norms. Other courts of appeals undertake plenary review to ensure that the trial court accepting a jury waiver had sufficient information before it to conclude that the waiver was know-

ing and intelligent. Under the Seventh Circuit's approach, however, jury waivers may routinely be upheld on appeal even when there is no evidence in the record indicating that they are constitutionally valid. When a challenge to the waiver is not presented to the district court, the court of appeals will not even assess the sufficiency of the waiver unless there is affirmative evidence that the defendant *did not* understand his rights. Because the decision below excessively dilutes the protection afforded to an important constitutional right, this Court's review is warranted.

The right to a trial by jury is fundamental to our system of criminal justice; indeed, it is guaranteed by two separate constitutional provisions: Art. III, § 2, and the Sixth Amendment. The right exists to prevent governmental oppression and arbitrary law enforcement. *Williams* v. *Florida*, 399 U.S. 78, 100 (1970) (citing *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968)). Because this right is so essential, courts must "indulge every reasonable presumption against waiver" of the right." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Further, the jury right must be "jealously preserved," and "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *Patton* v. *U.S.*, 281 U.S. 276, 312 (1930). Finally, this Court has counseled appellate courts not to discharge their duty "as a mere matter of rote but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from [jury] trial[s] or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." *Id.*

Under the plain error standard adopted by the Seventh Circuit, the reviewing court effectively begins with the assumption that the waiver *was* valid, and looks to the trial record for evidence to the contrary. Here, the court of appeals rejected petitioner's claim because "[n]othing in this record reveals that [he] lacked a concrete understanding of his right to a jury trial or that he likely would have elected a jury trial but for the district court's failure to properly admonish him as to the nature of this right." App., *infra,* 14a. In other words, the lack of evidence of *invalid* waiver was deemed dispositive—contravening this Court's directive that courts should "indulge every reasonable presumption against waiver" of constitutional rights. *Johnson*, 304 U.S. at 464.

The Seventh Circuit asserted that its adoption of plain error review "does not compel us to abandon language in our earlier decisions to the effect that we will not presume a valid waiver of the defendant's right to a jury trial from a silent record." App., *infra,* 16a. It insisted that it was "presuming nothing as to the validity of [petitioner's] jury waiver," but was "simply holding that he has not carried his burden of establishing plain error in the district court's acceptance of the waiver." *Id.* That is a distinction without a difference, however: The practical effect of the Seventh Circuit's decision is to infer valid waiver from a silent record.

The Tenth Circuit's discussion in *Robertson* illustrates the correct approach. In that case, the court concluded that the absence of evidence in the trial record that the defendant's waiver was knowing, voluntary, and intelligent, "*coupled with the strong presumption against finding a waiver* of fundamental constitutional rights, compels us to reject the gov-

ernment's argument that her waiver is nevertheless valid." 45 F.3d at 1433 (emphasis added) (citation omitted). "Accepting the government's argument," the court continued, "would require us to permit the waiver of a fundamental constitutional right based on nothing more than conjecture and speculation. This we decline to do. The right of trial by jury is one enjoyed by the people as well as defendants and courts should be hesitant to dispense with that right." *Id.*

In holding that respondent's claim is reviewable only for plain error, the Seventh Circuit has done what the Tenth Circuit warned against in *Robertson*: It has allowed "the waiver of a fundamental constitutional right based on nothing more than conjecture and speculation." 45 F.3d at 1433, Because the jury trial right should be adequately protected in *all* circuits, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MIRIAM R. NEMETZ
Counsel of Record
MAYA D. SONG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

SEPTEMBER 2009

APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (MAR. 11, 2009)

United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LARRY A. WILLIAMS,

Defendant-Appellant.

No. 07-3004

Argued April 10, 2008.

Decided March 11, 2009.

BEFORE: EASTERBROOK, Chief Judge, and ROVNER and SYKES, Circuit Judges.

ROVNER, Circuit Judge.

Following a bench trial, Larry Williams was convicted of distributing crack cocaine and was ordered to serve a prison term of 252 months. Williams appeals, contending that the district court erred in accepting his jury waiver without taking steps to ensure that the waiver was knowing and intelligent. Because Williams did not raise this issue below, our review is confined to one for plain error, and the record does not support a finding that his substantial rights were affected by any error in accepting his waiver. We therefore affirm Williams' conviction.

I.

A one-count indictment charged that Williams knowingly and intentionally distributed more than fifty grams of cocaine base in the form of crack cocaine, in violation of 21 U.S.C. § 841(a)(1). R. 5. The basis for the charge was Williams' sale of approximately fifty-eight grams of crack cocaine to an undercover agent of the Bureau of Alcohol, Tobacco and Firearms and a cooperating individual. The sale took place on October 30, 2003. Williams was arrested more than a year later, on November 4, 2004, and was indicted on November 30, 2004. He was arraigned on December 7, 2004, and entered a plea of not guilty. A series of status conferences and continuances ensued. The Federal Defender was appointed to represent Williams on May 19, 2006, after his previously-appointed counsel withdrew.

On November 30, 2006, when the parties' counsel appeared before the court for another status hearing, Williams' attorney announced that Williams, who was not present, wanted a bench trial:

> Mr. Rodriguez: Good morning, your Honor. Sergio Rodriguez from the Federal Defender Program on behalf of Larry Williams. He was not brought over, but I was in contact with him. Your Honor, we are here to get a trial date finally. We are going to ask that this Court consider a bench trial. It should only be a couple of days long.
>
> * * *

The Court:	How long will it take?
Mr. Rodriguez:	It is only going to be a couple of days.
Mr. Gurland: [Assistant U.S. Attorney]	It should be quick.
The Court:	And you have consented?
Mr. Gurland:	I have no objection to a bench trial.
Mr. Rodriguez:	He is smiling, Judge.
The Court:	Well, you actually have to consent.
Mr. Gurland:	I consent.
The Court:	I know that is painful.

R. 100 at 2–3. The court set the matter down for a bench trial on March 5, 2007.

The record of that hearing manifests compliance with the second and third of the conditions set forth in Federal Rule of Criminal Procedure 23(a) for a bench trial—consent by government and consent by the court—but not the first—a written waiver by the defendant of his right to a jury trial. The record contains no such written waiver, and neither party maintains that the defendant ever executed such a waiver.

Subsequent to this hearing, Williams' counsel filed a motion seeking leave to withdraw from representing Williams and to continue the trial date based on a breakdown of the attorney-client relationship. In that motion, Williams' attorney noted that "Mr. Williams still wishes to have a bench trial and would

like one as soon as possible, but would like to have some time to prepare with new counsel." R. 58 at 2 ¶ 4. The court granted counsel's request to withdraw and a new attorney was appointed in his stead, but the scheduled trial date remained in place.

When the parties appeared for trial as scheduled on March 5, the court took the opportunity at the outset to confirm that Williams indeed wished to waive his right to a jury trial in favor of a bench trial. "I just want to make sure that you know you do have a right to a jury trial," Judge Andersen told Williams. R. 77-1 at 3. "And would you like to have a bench trial and waive the jury trial?" *Id.* "Yes, sir," Williams replied. *Id.* The trial commenced and concluded on the following day, when Judge Andersen found Williams guilty. The judge later ordered him to serve a prison term of 252 months.

Although the court confirmed with Williams at the start of the trial that he wished to waive his right to a jury trial, the court did not comply with the supervisory rule we adopted in *United States* v. *Scott*, 583 F.2d 362, 364 (7th Cir. 1978) (per curiam), that requires a district court to interrogate a defendant before accepting his jury waiver in order to confirm that he understands the nature of the right and the consequences of his waiver. In *United States* v. *Delgado*, 635 F.2d 889, 890 (7th Cir. 1981), we set out a colloquy that we viewed as sufficient to accomplish this task, one that explains to the defendant that (1) "a jury is composed of twelve members of the community"; (2) "the defendant may participate in the selection of jurors"; (3) "the verdict of the jury is unanimous"; and (4) in a bench trial, "the judge alone will decide guilt or innocence." The court's brief exchange with Williams at the start of the trial did not

cover these points; the court simply confirmed that Williams knew he had a right to a jury trial and wished to waive it.

At no time in the proceedings below, however, did Williams or his counsel ever raise these omissions. Neither during nor after the trial did Williams object to the trial or to the judge's verdict on the ground that his waiver of the jury was uninformed and therefore invalid.

It is only on appeal that Williams argues that he did not knowingly and intelligently waive his right to trial by a jury. In the absence of a *Delgado* colloquy and other record evidence establishing his comprehension of the nature of right he was waiving, Williams contends that his jury waiver was invalid and that we must vacate his conviction and remand for a new trial. Alternatively, he asks that we remand for an evidentiary hearing as to whether his jury waiver was knowing and intelligent.

II.

The Sixth Amendment right to a trial by a jury in a criminal case is considered "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491 (1968), safeguarding the defendant from "oppression by the Government," *id.* at 155, 88 S. Ct. at 1451. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence." *Williams* v. *Florida*, 399 U.S. 78, 100, 90 S. Ct. 1893, 1905–06, 26 L. Ed. 2d 446 (1970). It is a right that the defendant can choose to waive. *Adams* v.

McCann, 317 U.S. 269, 275, 63 S. Ct. 236, 240, 87 L. Ed. 268 (1942); *Patton* v. *United States*, 281 U.S. 276, 312, 50 S. Ct. 253, 263, 74 L. Ed. 854 (1930). In keeping with the importance of the right, however, the decision to waive a jury is among those basic decisions about a case as to which the defendant himself has the ultimate authority; counsel may not make the decision on his behalf. *Jones* v. *Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983); *United States* v. *Boyd*, 86 F.3d 719, 723–24 (7th Cir. 1996); *United States* v. *Robinson*, 8 F.3d 418, 423 (7th Cir. 1993) (quoting *Williams* v. *DeRobertis*, 715 F.2d 1174, 1182 (7th Cir. 1983)). For the defendant's waiver to be valid, it must be voluntary, knowing, and intelligent. *Williams*, 715 F.2d at 1178–79 (quoting *Brady* v. *United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747 (1970)); see also *Corcoran* v. *Buss*, 551 F.3d 703, 711 (7th Cir. 2008).

Rule 23(a) provides that "[i]f the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves." Fed. R. Crim. P. 23(a). The rule reflects the Supreme Court's decision in *Patton*, 281 U.S. at 312, 50 S. Ct. at 263; see also *Adams*, 317 U.S. at 275, 63 S. Ct. at 240, and by requiring that the defendant's waiver be in writing, the rule serves "to ensure that a criminal defendant is aware of his jury right before waiving it and that any waiver is personal and unequivocal," *United States* v. *Diaz*, 540 F.3d 1316, 1322 (11th Cir. 2008) (per curiam) (quoting *United States* v. *Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984), *judgment aff'd*, 471 U.S. 773, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985)); see also *Brown* v. *Burns*, 996 F.2d 219, 221 (9th Cir. 1993) (per curiam) (com-

pliance with Rule 23(a) provides best record evidence of defendant's voluntary waiver).

Compliance with Rule 23(a) does not by itself establish that the defendant's waiver was informed, and it is for that reason that in *Scott* we instructed district courts to engage the defendant in a colloquy, later outlined in *Delgado*, designed to ensure that the defendant understands what he is giving up when he waives his right to a jury. See *Brady*, 397 U.S. at 748, 90 S. Ct. at 1469 ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); see also *United States* v. *Lilly*, 536 F.3d 190, 197–98 (3d Cir. 2008) (coll. cases that either require or urge colloquies to ensure that jury waivers are informed).

However, neither a *Delgado* colloquy nor a written waiver is a constitutional mandate. See *United States* v. *Rodriguez*, 888 F.2d 519, 527 (7th Cir. 1989) (colloquy not constitutionally required) (citing *Williams*, 715 F.2d at 1178); *Wandick* v. *Chrans*, 869 F.2d 1084, 1088 (7th Cir. 1989) (same); *Robinson*, 8 F.3d at 422 (citing *Wandick*, 869 F.2d at 1088) (written waiver not constitutionally required); *Brown*, 996 F.2d at 221 (same); *Fitzgerald* v. *Withrow*, 292 F.3d 500, 504 (6th Cir. 2002) (constitution does not require that jury waiver take any particular form); see also *Basile* v. *United States*, 999 F.2d 274, 276 (7th Cir. 1993) (mere violation of federal criminal rule is not a constitutional error). Nor is reversal automatic in the exercise of our supervisory authority for the failure to comply with one or both of these requirements. See *Robinson*, 8 F.3d at 422; *Rodriguez*, 888

F.2d at 527–28.[1] As we have said, the sole constitutional requirement is that the waiver be voluntary, knowing, and intelligent. The colloquy and the written waiver serve to document these qualities, but a jury waiver may be valid despite their absence. So long as the defendant had a "concrete understanding" of his right to a jury trial, his waiver is valid. *Williams*, 715 F.2d at 1180 & n.3; see also *Whitehead* v. *Cowan*, 263 F.3d 708, 732–33 (7th Cir. 2001); *Robinson*, 8 F.3d at 422–23.

Here we have a record throwing little if any light on Williams' understanding of the right he waived. (Williams does not argue that his waiver was involuntary, and given that the district judge personally addressed him and confirmed his wish to waive a jury trial, we have no reason to question the voluntariness of the waiver.) Because Williams never raised this issue below, no evidence was elicited as to the circumstances underlying his waiver and the district court never made a finding as to whether it was knowing and intelligent. The lack of a written waiver by Williams was a violation of Rule 23(a), and the failure to conduct a *Delgado* colloquy was contrary to the supervisory rule we adopted in *Scott*. But these errors do not call for reversal unless they affected Williams' substantial rights. 28 U.S.C. § 2111; Fed. R. Crim. P. 52; *Rodriguez*, 888 F.2d at 527–28. And we cannot determine whether his sub-

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[1] Both *Robinson* and *Rodriguez* adhere to the Supreme Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988), which holds that a federal court may not rely on its supervisory power to circumvent the harmless error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). See also *Peguero* v. *United States*, 526 U.S. 23, 29–30, 119 S. Ct. 961, 965, 143 L. Ed. 2d 18 (1999).

stantial rights were affected without evidence revealing what Williams knew and understood when he waived his right to a jury. The import of a silent record depends on which party bears the burden of production and persuasion on this question. *Pease* v. *Production Workers Union of Chicago & Vicinity Local 707*, 386 F.3d 819, 823 (7th Cir. 2004). If the applicable standard of review is harmless error, Rule 52(a), then it is the government that bears the burden, *United States* v. *Vonn*, 535 U.S. 55, 58, 122 S. Ct. 1043, 1046, 152 L. Ed. 2d 90 (2002), and the lack of relevant evidence works to its detriment. *E.g.*, *United States* v. *Garcia*, 439 F.3d 363, 369 (7th Cir. 2006). If the standard is plain error, Rule 52(b), then it is Williams who bears the burden of production and persuasion, *Vonn*, 535 U.S. at 58, 122 S. Ct. at 1046, and a silent record works to his detriment. *E.g., United States* v. *Griffin*, 521 F.3d 727, 730 (7th Cir. 2008).

We take our cue in how to assess the validity of Williams' waiver from two Supreme Court decisions dealing with guilty pleas given by defendants who were not fully apprised of their trial rights before waiving those rights: *Vonn*, 535 U.S. 55, 122 S. Ct. 1043, 152 L. Ed. 2d 90, and *United States* v. *Dominguez Benitez*, 542 U.S. 74, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). The fact that this case involves a jury waiver rather than a guilty plea does not meaningfully distinguish it from *Vonn* and *Dominguez Benitez*, as they deal with a defendant's decision to waive *all* of his trial rights, including his right to a jury. The decision to plead guilty, like the decision to waive a jury trial, is one that is personal to the defendant. *Jones*, 463 U.S. at 751, 103 S. Ct. at 3312. It is a decision that must be voluntarily, knowingly and intelligently made. *E.g., United*

States v. *Ruiz*, 536 U.S. 622, 629, 122 S. Ct. 2450, 2455, 153 L. Ed. 2d 586 (2002). And there is a detailed colloquy that a district court must engage in with the defendant before he pleads guilty which, like the *Delgado* colloquy, is designed to ensure that the decision to waive his constitutional rights is freely and intelligently made. See Fed. R. Crim. P. 11; see *McCarthy* v. *United States*, 394 U.S. 459, 464–65, 89 S. Ct. 1166, 1170, 22 L. Ed. 2d 418 (1969).

Vonn holds that where a defendant challenges the validity of his guilty plea based on an error in the trial court's plea colloquy that he did not bring to the trial judge's attention, he bears the burden of showing that the defect constitutes plain error affecting his substantial rights. 535 U.S. at 59, 122 S. Ct. at 1046; see Rule 52(b). Vonn was charged with multiple offenses and had pleaded guilty first to one charge and later to two others. On both occasions, in advising Vonn of the rights that he was waiving by pleading guilty, the court neglected to mention his right to representation by an attorney if he went to trial, in violation of Federal Rule of Criminal Procedure 11. See Fed. R. Crim. P. 11(b)(1)(D) ("Before the court accepts a plea of guilty * * * the court must address the defendant personally in open court * * * [and] must inform the defendant of, and determine that the defendant understands, * * * the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding[.]"). Although Vonn later (unsuccessfully) sought to withdraw one of his guilty pleas, he did not do so on the basis of the omission in the court's Rule 11 plea colloquy. Not until he appealed his conviction did Vonn object to the validity of his pleas based on that defect. Because he had not raised the omission with the district court, the Su-

preme Court held that Vonn was obliged to satisfy the plain-error standard set forth in Rule 52(b). The Court believed that to instead place the burden on the government to show that the error was harmless would give the defendant an undesirable incentive to keep quiet about the error unless and until he later decided he was unhappy with the outcome of his guilty plea:

> [A] defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness. A defendant could simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government's shoulders.

535 U.S. at 73, 122 S. Ct. at 1054. The Court went on to hold that in deciding whether the defendant has carried the burden of showing that the error in the plea colloquy is plain error as defined by Rule 52(b), a reviewing court is not confined to the change-of-plea proceeding itself but may look to the entire record to determine whether the defendants' substantial rights were affected. *Id.* at 74–76, 122 S. Ct. at 1054–55.

Dominguez Benitez in turn holds that in order to demonstrate that his substantial rights were affected by a defect in the Rule 11 plea colloquy that he did not bring to the district court's attention, a defendant must convince the court that it is reasonably likely that he would not have pleaded guilty had he been properly apprised of his rights. 542 U.S. at 83, 124 S. Ct. at 2340. As in *Vonn*, the district court in

Dominguez Benitez had omitted a key admonishment from the Rule 11 colloquy it engaged in with the defendant before accepting his guilty plea: The court failed to advise Dominguez that he could not withdraw his plea if the court later declined to accept the government's sentencing stipulations or recommendations. See Rule 11(c)(3)(B). But like Vonn, Dominguez first raised this omission on appeal, so he was obliged by the Court's holding in *Vonn* to show that the error constituted plain error that affected his substantial rights. The Court of Appeals concluded that it was enough for Dominguez to show that the district court's Rule 11 error was "not minor or technical" and that "he did not understand the rights at issue when he entered his guilty plea." *United States* v. *Dominguez Benitez*, 310 F.3d 1221, 1225 (9th Cir. 2002). But the Supreme Court held that the plain error standard required Dominguez to show something more:

> As *Vonn* makes clear, the burden of establishing entitlement to relief for plain error is on the defendant claiming it, and for several reasons, we think that burden should not be too easy for defendants in Dominguez's position. First, the standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error. Second, it should respect the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt in open court, and are indispensable in the operation of the modern criminal justice system. And, in this case, these reasons are complemented by the fact,

> worth repeating, that the violation claimed was of Rule 11, not of due process.
>
> We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the out-come of the proceeding.

Id. at 82–83, 124 S. Ct. at 2340 (citations, internal quotation marks, and footnote omitted).

These two decisions leave no doubt as to the standard of review that governs Williams' claim, which of the parties bears the burden of proof, and what must be shown. As in *Vonn* and *Dominguez Benitez*, there was a failure to apprise Williams of the nature of the right that he was surrendering in his waiver, and as in those two cases, Williams did not raise the omission in the district court. As a result, our review is for plain error, and it is Williams who must show that his substantial rights were affected by the error. He must show that he did not have a concrete understanding of his right to a jury trial, and that but for the trial court's failure to ensure he had that understanding, there is a reasonable probability that he would not have waived the right. Our assessment of Williams' waiver is informed not just by his colloquy with the district judge (which in this case was limited to asking him whether he wished to waive his right to a jury) but by the entire record.

Nothing in this record reveals that Williams lacked a concrete understanding of his right to a jury trial or that he likely would have elected a jury trial but for the district court's failure to properly admonish him as to the nature of this right. It is entirely possible that Williams did have an adequate understanding of the right, whether by virtue of his attorney's advice or his own education and experience, and that he still would have waived a jury trial assuming that the court had followed *Scott* and *Delgado* (and for that matter, Rule 23) to the letter. It is also possible that Williams had no idea what he was doing and that he would have insisted on a jury trial had he been properly admonished. We have no way to assess his mental state on this record.

That it is Williams who bears the burden of production and persuasion dictates the outcome. Having submitted not so much as his own affidavit averring that he did not adequately comprehend the nature of his right to a jury trial and that he would not have waived the right had he properly understood it, Williams has failed to produce any evidence which would demonstrate that his substantial rights were affected. He has not shown (and on this record cannot show) that plain error occurred, and we have no choice but to affirm his conviction.

Williams endeavors to avoid this result and to distinguish *Vonn* and *Dominguez Benitez* by characterizing as a structural error the district court's failure to properly admonish him as to the nature of his right to a jury. Structural errors comprise "a limited class of fundamental constitutional errors that defy analysis by 'harmless error' standards." *Neder* v. *United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) (internal quotation marks

and citation omitted); see *Washington* v. *Recuenco*, 548 U.S. 212, 218 n.2, 126 S. Ct. 2546, 2551 n.2, 165 L. Ed. 2d 466 (2006) (collecting examples of structural errors). These types of errors "affect[ ] the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302 (1991), and "are so intrinsically harmful as to require automatic reversal (*i.e.* 'affect substantial rights') without regard to their effect on the outcome." *Neder*, 527 U.S. at 7, 119 S. Ct. at 1833; *Dominguez Benitez*, 542 U.S. at 81, 124 S. Ct. at 2339.

But structural errors are rare, *Recuenco*, 548 U.S. at 218, 126 S. Ct. at 2551, and the error that occurred here was not of this nature. To be sure, there are cases that refer to errors involving jury waivers as structural. *E.g.*, *Miller* v. *Dormire*, 310 F.3d 600, 603–04 (8th Cir. 2002) (finding structural error where defendant was denied his right to jury as result of his attorney's defective performance; attorney waived right on defendant's behalf without explaining right to him, and defendant did not realize he could object); *United States* v. *Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997) (district court's failure to conduct colloquy to ensure that defendant who did not speak English made voluntary, knowing, and intelligent decision to waive jury required automatic reversal because error affected framework of trial and court could not determine whether error harmless). We have our doubts as to whether the structural terminology of such cases can be reconciled with *Dominguez Benitez*, which makes plain that one *can* evaluate whether the defendant's substantial rights were affected by the failure to properly admonish him as to the nature of his jury right. An invalid jury waiver certainly affects the framework of a

case in the sense that the determination of guilt or innocence will be made by a judge rather than a jury, and it would be a dubious enterprise to try and show that a jury likely would have reached a different result than the judge did. That is the point made by cases like *Miller*, 310 F.3d at 604. But for purposes of determining whether the waiver *was*, in fact, invalid, one can determine whether the defendant adequately understood his right to a jury; moreover, if the defendant lacked such an understanding, one can assess the likelihood that he would have stood on his right to a jury had he been properly admonished of his right. See, *e.g.*, *Miller*, 310 F.3d at 602 (defendant testified that had he understood his right to a jury, he would have insisted on a jury trial rather than waiving right); cf. *Nelson* v. *Hvass*, 392 F.3d 320, 323–24 (8th Cir. 2004) (defendant not entitled to relief where he failed to show that he would not have waived jury had his attorney properly advised him as to his jury right).

Our adherence to the approach that the Supreme Court set forth in *Vonn* and *Dominguez Benitez* does not compel us to abandon language in our earlier decisions to the effect that we will not presume a valid waiver of the defendant's right to a jury trial from a silent record. See *Robinson*, 8 F.3d at 422 (quoting *Wandick*, 869 F.2d at 1087); see also *Carnley* v. *Cochran*, 369 U.S. 506, 516, 82 S. Ct. 884, 890, 8 L. Ed. 2d 70 (1962). We are presuming nothing as to the validity of Williams' jury waiver; we are simply holding that he has not carried his burden of establishing plain error in the district court's acceptance of the waiver. Our decision, as we have explained, is simply a function of the elements of plain error and the allocation of the burden of proof to show such error. Had the error been preserved by raising it be-

low, with the burden falling to the government to show harmless error under Rule 52(a), then the result of this appeal might well have been different on such a limited record.

Our decision today may amount to a departure from *Robinson* to the extent that *Robinson* treated the validity of a jury waiver as a preserved issue although, as in this case, it was first raised on appeal. We note that the waiver in *Robinson* was memorialized solely by counsel and by the court, without confirmation on the record by Robinson himself that he wished to waive his right to a jury. On that record, we presumed that Robinson had only learned of his right to a jury when he conferred with appellate counsel and that, consequently, his first opportunity to raise the issue was on appeal. 8 F.3d at 425–26. We therefore remanded the case to the district court for an evidentiary hearing as to the validity of the waiver. *Id.* at 426. Here, by contrast, Williams himself did state on the record that he wished to waive a jury trial—so he knew, in some sense, that he had such a right. Nonetheless, he contends that he is entitled, at the least, to an evidentiary hearing of the kind we ordered in *Robinson* to ascertain whether his waiver was informed. But *Robinson* and similar cases pre-dated *Vonn* and *Dominguez Benitez*, and in light of the approach that the Supreme Court has taken to trial waivers which were not challenged in the district court, we are obliged to follow their lead.[2]

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[2] We note that prior to *Vonn*, the Ninth Circuit followed a similar approach to plea-colloquy defects, placing the burden on the government to show that any error in admonishing the defendant of his rights before accepting his guilty plea was harmless, even if the error had not been raised below, and reversing in the absence of such a showing. See *United States* v. *Odedo*, 154

Because Williams did not raise the validity of his jury waiver in the court below, he must demonstrate that the acceptance of his waiver amounts to plain error. In particular, he must show that he did not have a concrete understanding of his right to a jury and that it is reasonably probable that he would not have waived a jury had he had such an understanding. He cannot make that showing on the limited record before us.

When we heard oral argument in this case, we raised the possibility that Williams might wish to drop this direct appeal (which raises no issue other than the jury waiver) and reserve the validity of his waiver for collateral review under 28 U.S.C. § 2255, and the opportunity that might afford him to develop the record as to the relevant facts surrounding his waiver. See, *e.g.*, *United States* v. *Rosario*, 234 F.3d 347, 352 (7th Cir. 2000). We gave Williams and his counsel time after argument to make that decision. We are informed, however, that Williams wishes to proceed with this appeal. So be it.

Williams obviously has access to his own mental state and could have made a record in the district court as to what he did or did not understand about his right to a jury and whether he still would have waived a jury trial had he known all that he was entitled to know about that right. Under *Vonn* and *Dominguez Benitez*, he bears the consequence of his failure to make a record on these subjects. As he has

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F.3d 937, 940 (9th Cir. 1998). But the Supreme Court rejected this approach in *Vonn*, which itself was a Ninth Circuit case. See *United States* v. *Vonn*, 294 F.3d 1093, 1093–94 (9th Cir. 2002) (on remand from the Supreme Court, noting the change the Supreme Court's decision had effected in the approach to such errors).

not shown that his substantial rights were affected by the district court's failure to engage in a *Delgado* inquiry before accepting his waiver, we must affirm his conviction.

III.

Because Williams did not challenge the validity of his jury waiver in the district court, he must show that the district court committed plain error in accepting his waiver without ensuring that his waiver was intelligent. On a record that is largely silent as to the informed nature of Williams' waiver, he cannot make this showing. We take the opportunity to remind the district courts and counsel for both defendants and the government that they are obliged to follow the dictates of Rule 23(a) and our decisions in *Scott* and *Delgado* in accepting a defendant's jury waiver and proceeding with a bench trial.

AFFIRMED

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING REHEARING (JUNE 11, 2009)

United States Court of Appeals for the
Seventh Circuit
Chicago, Illinois 60604

June 11, 2009

Before
FRANK H. EASTERBROOK, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

No. 07-3004

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LARRY A. WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 04 CR 967
Wayne R. Andersen, *Judge.*

ORDER

No judge of the court having called for a vote on the Petition for Rehearing and Suggestion For Rehearing En Banc filed by Defendant-Appellant on May 26, 2009, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing and Suggestion For Rehearing En Banc is **DENIED**.

APPENDIX C

CONSTITUTIONAL PROVISIONS

U.S. CONST. ART. III, § 2

Constitution of the United States
Article III. The Judicial Branch
Section 2, Clause 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. AMEND. VI

Constitution of the United States
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX D

PROVISIONS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

FED. R. CRIM. P. 11

Federal Rules of Criminal Procedure for the United States District Courts
IV. Arraignment and Preparation for Trial

Rule 11. Pleas

(a) Entering a Plea.

(1) *In general.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sen-

tencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

FED. R. CRIM. P. 23(A)

Federal Rules of Criminal Procedure for the United States District Courts
VI. Trial

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves.

FED. R. CRIM. P. 52

Federal Rules of Criminal Procedure for the United States District Courts
IX. General Provisions

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.